

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

PINNACLE PROCESSING, INC. ^{1/}

Employer

and

Case 9-RC-17813

UNITED MINE WORKERS OF AMERICA

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer operates a coal processing plant which prepares coal for shipment at its facility located in Debord, Kentucky. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of approximately 38 production and maintenance employees, excluding all contractors, office clerical employees and all professional employees and supervisors as defined in the Act. There is no recent history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer and Petitioner filed briefs with me, which I have carefully considered in reaching my decision. At the hearing, the Employer, contrary to the Petitioner, contended that the shipping clerk and lab technician are confidential employees and do not share a community of interest with the other unit employees. However, I note the Employer has not renewed its contention that the lab technician and shipping clerk are confidential employees in its brief. Finally, the Petitioner has stated a willingness to proceed to an election in any unit found appropriate.

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded, as discussed below, that with respect to the Employer's unit placement contentions, the record does not support a conclusion that Jim Woods, shipping clerk, or Dale Sloan, lab technician, are confidential employees. Further, I conclude that they have a community of interest with the other employees in the unit found appropriate. Accordingly, I have directed an election in a unit of approximately 38 employees employed by the Employer at its Debord, Kentucky operation.

¹ / The name of the Employer appears as amended at the hearing.

To provide context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer operates a coal processing facility in Debord, Kentucky where it prepares coal for shipment by removing the out-of-seam and the in-seam dilutions out of the coal. The preparation plant is approximately 140 feet long, 65 feet wide and 8 ½ stories high. The plant office building which houses the plant office, shipping clerk's office, laboratory office, and coal laboratory is approximately 100-150 feet from the preparation plant. These offices are all separated by a door. Approximately 200 feet across from the preparation plant is the "stoker" or "stoker" load out. Stoker coal is a higher quality burning coal which is loaded on railroad cars at the load out. In addition, approximately 1000-1500 feet below the preparation plant is the unit train load out on the railroad. There are also two warehouses at the plant – one is located next to the plant office and the other is within 100 feet of the preparation plant. The bath house is adjacent to the plant office.

The parties stipulated that the Employer employs five supervisors at its facility: Douglas Blackburn, Joe Brumfield, John Harris, supervisors, Kyle Jarrett, foreman, and Greg Preston, plant superintendent. All of the aforementioned individuals have the authority to hire, discharge and/or discipline employees or to effectively recommend such actions and make work assignments to employees and independently direct employees in the performance of their work. All employees and supervisors, excluding the plant superintendent, are paid hourly. All employees, including the plant superintendent, receive the same benefits.

The Employer operates three shifts. Sloan works a split shift from 6 p.m. to 2 a.m. so that there is laboratory coverage for the detection of problems on all shifts. Dan White, a contractor employee, operates the laboratory during the first shift. White works from 7:30 a.m. to 3:30 p.m. Occasionally White and Sloan swap shifts. ^{2/}

II. THE LAW AND ITS APPLICATION

In reaching my conclusion to include the shipping clerk and lab technician in the production and maintenance unit, I have taken into consideration that the Petitioner seeks to represent all of the Employer's employees at its preparation plant facility. The Board has long recognized the appropriateness of such units. It is only when the interests of one group of employees are dissimilar from those of another group that a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391 (1961). In addition, I note that the Board has often expressed its reluctance to leave a residual unit where the employees, as here, could be included in the larger group. *Huckleberry Youth Programs*, 326 NLRB 1272 (1998). Finally, I note, as discussed more fully below, that the record does not establish that the interests of the shipping clerk and lab technician are sufficiently dissimilar from the other employees to warrant their exclusion from the larger unit where, as here, the Petitioner seeks to represent all employees in the same unit.

^{2/} The parties agree that White should not be included in any unit found appropriate.

III. SHIPPING CLERK

Woods is the Employer's sole shipping clerk. As previously noted, he is an hourly employee and receives the same benefits as the Employer's other employees. He is supervised by Brumfield who also supervises all first shift employees. The shipping office in which Woods works has a telephone, fax machine and computer. The plant superintendent also uses this same fax machine. No one else uses the computer in the shipping office.

Woods' duties include shipping processed coal, providing for the transportation of the coal, communicating with customers and coordinating and scheduling rail cars. Woods is the primary contact between the Employer and its customers. The customers place orders through the Employer's marketing department, Pelver Coal Sales. The marketing department then contacts Woods and informs him of the order. The customer faxes a copy of the contract to Woods. Some contracts may contain pricing and quality information. After receiving the contract, Woods then coordinates and schedules the coal delivery with the customer. If the customer wants to increase its order, it contacts Woods. Woods has the discretion to alter the shipment as long as he does not exceed the parameters of the contract. However, if a customer wants more coal than provided for in the contract it must contact the marketing department. Woods also prepares customer billing statements. One of its customers has an Internet billing system, to which Woods has a password and access. Woods also provides daily status reports to the railroads concerning railroad units on site.

Although the record shows that Woods works in an office which is located in the plant office complex, he spends a significant amount of time loading coal at the stoker loadout. Woods has contact with other production and maintenance employees during the day when he is relieved at the loadout. Woods spends between 60 and 70 percent of his work time at the loadout and loads between 85 and 90 percent of coal that is loaded at the stoker loadout. Woods loads coal in the rail cars via a conveyor system. A track unit, which is radio controlled, moves the rail cars onto the load out. Woods uses the controls to open the gate and load the rail cars. The loadout is an integral part of processing and shipping coal to customers. Woods also cleans the railroad cars about once or twice per week. Periodically, another production and maintenance employee assists Woods in the cleaning of rail cars.

IV. ANALYSIS AND CONCLUSION - SHIPPING CLERK

Confidential Status

The Board has long held that the exception for excluding individuals from bargaining units on the ground that they are confidential employees should be narrowly drawn. Confidential employees are those employees "who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations." *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 107 (1981).

The record shows that Woods does not participate in management meetings or establish and effectuate labor relation policies nor does he work in a confidential capacity to any person vested with the authority to establish or implement the Employer's labor policies. Further, it is

well settled that employees who have access to financial information about the Employer's business are not confidential. *Dinkler-St. Charles Hotel*, 124 NLRB 1302 (1959); *Broadart Inc.*, 257 NLRB 380, 384, fn. 1 (1985). Accordingly, I find that Woods is not a confidential employee.

Community of Interest

The record reflects that Woods has a sufficient community of interest with the other production and maintenance employees to warrant his inclusion in the unit. He shares similar working conditions, pay and benefits. He spends a substantial amount of time at the stoker loadout and has regular work related interaction with unit employees used to replace him at the loadout. The loadout is a production activity in the processing of coal and is therefore functionally integrated with the work of the other production and maintenance employees. Although not determinative, the evidence established that under previous unionized operators of the preparation plant, the shipping clerk (Woods) has been included in the bargaining unit.

The Employer asserts in its brief that the shipping clerk position in this matter is "analogous" to the production control clerk in *Virginia Manufacturing Company*, 311 NLRB 992 (1993). This case is, however, distinguishable from the instant matter. *Virginia Manufacturing* involved a challenge to the ballot of the production control clerk who attempted to vote in an election involving a production and maintenance unit. The Board in sustaining the challenge noted that the production control clerk was more of an "officer" rather than a plant clerical. Thus, the Board found that the production control clerk, unlike the shipping clerk here, had certain monetary duties that had the "potential" of placing him in an adversarial position to the interest of the production employees.

Based on the foregoing and the entire record, I find that the shipping clerk, Jim Woods, is not a confidential employee and that he shares a substantial community of interest with the other unit employees. Accordingly, I will include him in the unit.

V. LAB TECHNICIAN

Sloan is the Employer's sole lab technician, although a contractor provides another person to operate the laboratory during first shift. As previously noted, Sloan is an hourly employee with the same benefits as all other employees. Sloan works under the supervision of the second shift supervisor, Douglas Blackburn. Blackburn also supervises all other second shift employees.

The laboratory testing involves two stages – the preparation stage and testing stage. In the preparation stage, a 5 gallon sample bucket of coal is taken by whomever (supervisor or production and maintenance employee) is available to the prep room which is a building approximately 30 feet in front of the laboratory. On occasion Sloan goes to the preparation plant and collects his own samples. The person who drops off coal for sampling must provide Sloan with the origin of the coal, the blend of coal and from which storage silo or stockpile the coal was taken. Sloan then crushes the coal, riffles it, dries it and then pulverizes it before bringing it into the laboratory for analysis. The testing stage determines whether the coal meets certain

specifications, such as, moisture content, ash content, sulfur content and BTU. There is a computer in the laboratory which calculates the results of the tests.

There is one production and maintenance employee who has previous laboratory experience, but the Employer does not use this employee as a replacement for Sloan. Sloan and the contractor employee are the only people who use the ovens, scales or computer in the laboratory. Sloan records the results of tests on a daily log. If the results indicate that the required specifications are not being met, Sloan informs the shift foreman who attempts to identify the problem and correct it. If there is a quality issue that can not be corrected, Sloan notifies the plant superintendent at his home.

Although the evidence establishes that Sloan works in the laboratory which is located in the plant office complex and adjacent to the shipping clerk's office, he also assists in the switching of railroad cars two to three times per week and loads the stoker car. Sloan spends approximately 10 percent of his work time at the load out loading trucks and stoker cars. Sloan also substitutes for absent production employees. In addition, Sloan maintains radio contact with the control room where he talks with the dozer operators and control room operators. Sloan uses the radio to inform the plant operator and his foreman of the analysis results. He also advises the plant operator of deliveries. In this regard, Sloan communicates with the plant operator several times per day. Sloan is subject to the same policies and work rules as all other employees.

VI. ANALYSIS AND CONCLUSION – LAB TECHNICIAN

Confidential Status

At the hearing, but not in its brief, the Employer argued that the laboratory technician was a confidential employee because he had access to the Customer Quality Records which are maintained in the laboratory. Although Sloan has access to such records, he does not use them to perform any of his duties. The Board has consistently held that an employee will not be regarded as confidential merely by virtue of having access to confidential records relating to the budget and other financial or business matters. *The Washington Post Company*, 254 NLRB 168, 196 (1981); *Planned Parenthood Association of Miami Valley, Inc.*, 217 NLRB 1098 (1975); and *B.F. Goodrich Company*, 115 NLRB 722 (1956).

The record further discloses that Sloan does not participate in management meetings or establish and effectuate labor relations policies. Moreover, there was no evidence presented that Sloan assists or acts in a confidential capacity to any person who formulates, determines or effectuates management policies in the field of labor relations. *S.S. Joachim and Anne Residence*, 314 NLRB 1191, 1195 (1994); and *B.F. Goodrich*, supra. Accordingly, I conclude that Sloan is not a confidential employee.

Community of Interest

The evidence also establishes that Sloan has a sufficient community of interest with the other production and maintenance employees to warrant his inclusion in the same unit. Thus, the record discloses that he works in close proximity to the preparation plant and his office is adjacent to the office of the shipping clerk whom I have included in the unit.

The record also shows that Sloan shares similar working conditions, pay and benefits with the other production and maintenance employees. He and other unit employees are hourly and receive the same benefits. In addition, Sloan works during the second shift with other production and maintenance employees. Further, he and the second shift unit employees are supervised by the same supervisor. Moreover, Sloan has daily contact with other unit employees who bring him coal samples for testing. On occasion, when all other employees are unavailable, he obtains his own samples from the preparation plant. The testing of coal samples is functionally integrated with the preparation and processing of coal at the Employer's facility. Thus, it is Sloan's responsibility to let the shift foreman know whether the coal meets the necessary specifications. It appears that the coal cannot be shipped unless the foreman identifies and corrects any problem. If the problem cannot be corrected, Sloan notifies the plant superintendent.

Based on the foregoing and the record as a whole, I find that the laboratory technician, Douglas Sloan, is not a confidential employee and that he shares a community of interest with the other production and maintenance employees. Accordingly, I will include him in the unit. In reaching my conclusion regarding the community of interest between the lab technician and the other unit employees, I note that the record reflects that there is substantial integration between the job duties of the lab technician and other employees in the unit, existence of common supervision, frequent job-related contact with bargaining unit employees, close proximity to bargaining unit employees, and similar working conditions.

I also find that the cases relied on by the Employer in its brief, *United Operations, Inc.*, 338 NLRB No. 18 (2001) and *Sundor Brands, Inc.*, 334 NLRB 755 (2001), are distinguishable from the instant matter. In those cases, the unions sought to represent a unit consisting of only technicians as opposed to a wall-to-wall unit. Moreover, *United Operations*, supra, and *Sundor Brands*, supra, involved units of technical employees. The record does not establish that the laboratory technician is required to have any specialized training usually acquired in colleges, technical schools, or special courses. *Fisher Controls Company*, 192 NLRB 514 (1971). The remaining cases cited by the Employer deal with general community of interest standards and are not directly related to the facts of this case.

VII. EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Greg Preston, plant superintendent, Douglas Blackburn, Joe Brumfield, John Harris, supervisors, and Kyle Jarrett, foreman. Accordingly, I will exclude them from the unit.

VIII. CONCLUSION AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows.

1. The hearing officer's ruling made at the hearing are free from prejudicial error.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, including employees classified as equipment mechanic, equipment oiler/greaser, equipment operator, fine coal operator, mechanic helper/loadout operator, mechanic helper/equipment operator, #2 dump operator, plant electrician, plant mechanic, plant operator, plant utility, slate dump equipment operator, shipping clerk and lab technician, employed by the Employer at its Debord, Kentucky facility, excluding all contractors, office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

IX. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Mine Workers of America. The date, time, and place of the election will be specified in the notice of the election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining whether there is an adequate showing of interest. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election, only after I have determined that an adequate showing of interest exists among the employees in the units found appropriate.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 17, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

X. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 24, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 10th day of July 2003.

/s/ Earl L. Ledford, Acting Regional Director

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